IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 24, 2006

STATE OF TENNESSEE v. DAVID LEE BISHOP

Appeal from the Circuit Court for Grainger County
No. 3818 O. Duane Slone, Judge

No. E2005-02675-CCA-R3-CD - Filed December 14, 2006

The defendant, David Lee Bishop, was convicted at a jury trial in the Grainger County Circuit Court of four counts of rape of a child, a Class A felony. The defendant was sentenced to serve twenty-five years for each conviction, with the sentences imposed consecutively, for an effective 100-year sentence. The trial court later granted the defendant's request to modify the sentence and imposed twenty-year sentences, for an effective eighty-year sentence. The defendant then filed this appeal from the modified sentences, in which he contends that the trial court erred in enhancing the sentences and in imposing consecutive sentences. Because the record before us is inadequate for review of the issue, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

Edward Cantrell Miller, District Public Defender, and James Lee Deaton, Assistant Public Defender, for the appellant, David Lee Bishop.

Robert. E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General; and Tim Arrants, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

We begin by noting that the defendant's case is riddled with procedural irregularities. The defendant did not file a notice of appeal within thirty days of the imposition of judgment, as required by the Tennessee Rules of Appellate Procedure. See Tenn. R. App. P. 3(b), 4(a). Rather, he filed a "Motion to Reconsider" in the trial court. A motion to reconsider is not a pleading recognized by the Tennessee Rules of Criminal Procedure. State v. Turco, 108 S.W.3d 244, 245 n.2 (Tenn. 2003). Thus, the filing of such motion does not toll the time for filing a notice of appeal. State v. Lock, 839 S.W.2d 436, 440 (Tenn. Crim. App. 1992). Although the defendant did not cite Tennessee Rule of

Criminal Procedure 35 in his motion, the motion raised issues which were in the nature of Rule 35. The motion claimed that the trial court erred in imposing the sentences because insufficient evidence existed to support maximum sentences, erred in weighing the enhancement factors too heavily, and erred in failing to afford weight to the mitigating factors. The trial court treated the motion as one to reduce the defendant's sentence as is allowed by Rule 35, to which the state did not object, and we presume that the defendant's motion was made pursuant to Rule 35. The trial court rejected, at least by implication, each of the defendant's claims, by basing its ruling on Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). The trial court believed, albeit incorrectly, that Blakely required that the defendant's sentences be reduced to the presumptive length within the range. See State v. Gomez, 163 S.W.3d. 632 (Tenn. 2005) (holding that Tennessee's sentencing law allowing trial court to set sentence above the presumptive length in a range based upon factors not found by a jury or admitted by the defendant did not violate Sixth Amendment or conflict with Blakely), petition for cert. filed, 74 U.S.L.W. 3131 (Aug. 15, 2005).

The defendant has challenged the propriety of consecutive sentencing, but he did not file a timely notice of appeal from the trial court's imposition of consecutive sentences. His notice of appeal was filed following the trial court's ruling on the petition to rehear. Although the notice of appeal referred to the judgments which first imposed consecutive sentences, the filing of a Rule 35 motion does not toll the time for filing a notice of appeal for issues other than those raised in the motion for sentence reduction. See State v. Ruiz, ___ S.W.3d ___ (Tenn. 2006); State v. Bilbrey, 816 S.W.2d 71, 74-75 (Tenn. Crim. App. 1991).

Generally, appellate review of sentencing on direct appeal is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d) and -402(d). The parties advocate that standard of review in their respective briefs. However, in the case of an appeal from a motion for sentence reduction, the standard of review is abuse of discretion. Ruiz, ___ S.W.3d at ___; State v. Irick, 861 S.W.2d 375, 376 (Tenn. Crim. App. 1993).

We are unable, though, to conduct appellate review because the record on appeal does not contain a full transcript of the defendant's trial. The technical record contains a copy of a partial transcript of the trial, consisting only of the defendant's testimony. Without an adequate record from which we may review the evidence of the facts and circumstances of the defendant's crimes which led the trial court to impose an effective 100-year sentence originally, we are unable to determine whether the defendant has demonstrated further facts and circumstances which would warrant further reduction of his present effective eighty-year sentence. The defendant, as the appellant, has the burden to provide an adequate record for appellate review. Tenn. R. App. P. 24(b); State v. Taylor, 992 S.W.2d 941, 944 (Tenn. 1999). When the record is incomplete with respect to a challenged issue, this court cannot determine whether the trial court correctly rejected the defendant's claims and must conclusively presume that the trial court's determination was supported by the record. See, e.g., State v. Draper, 800 S.W.2d 489, 492 (Tenn. Crim. App. 1990). As such, we are bound to presume that the record supports the trial court's sentence modification to an effective eighty-year sentence and implied refusal to order the defendant's sentences to be served concurrently.

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE